No. 18198

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEPHAN RIESS and THELMA McKINNEY RIESS,
Appellants and Cross-Appellees,

vs.

C. W. MURCHISON and SIMI VALLEY DEVELOPMENT COMPANY,
Appellees and Cross-Appellants.

APPELLEES' AND CROSS-APPELLANTS' CLOSING BRIEF.

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Introductory Statement.

Appellants and Cross-Appellees ("Appellants" herein) begin their Consolidated Reply Brief on Appeal and Brief on Cross-Appeal (the "Reply Brief" herein) with a statement of points which bear brief analysis:

First, in their point "First" (Reply Br. pp. 1-2) Appellants suggest that we have changed our position in transit between the trial and the appeal: that whereas at the trial we advocated our position on factual grounds, we now urge it on legal grounds. The truth is—and this can come as no surprise to Appellants, as hereinafter appears—that we have at all times urged it on *both* bases, *i.e.,* the legal ground that the con-

tract is not susceptible to breach by anticipatory repudiation; the factual ground that even if the doctrine of anticipatory repudiation applied, the admitted and undisputed facts would not justify its invocation.

That the Trial Judge had both bases in mind is manifest from Conclusion of Law II, which reads as follows:

"II.

"The breaches of contract found to have been made by the defendants were not of such kind and character which, under the law and the undisputed facts, constituted breach by anticipatory repudiation so as to require the conversion of an obligation to pay specified amounts of money (or at the option of defendants, specified quantities of water) in futuro measured by the amount of water produced, saved, and sold from the Water Lands, into an immediate obligation for the payment in cash of all possible future obligations." [Clk. Tr. p. 356, lines 12-20.]

There were admitted facts, among them:

"V.

"That between March 20, 1956, and June 12, 1956, defendants C. W. Murchison and Simi Valley Development Company paid, or caused to be paid to plaintiffs, the sum of $50,000 of the purchase price for said properties, as set forth in paragraph 2(b) of the First Agreement (Plaintiffs' Exhibit 'A'). That in addition, during the period from May, 1955 through September, 1957, the further sum of $58,000 was paid, or caused

to be paid to plaintiffs, by defendants C. W. Murchison and Simi Valley Development Company, in 29 equal installments of $2,000 each; $28,000 of said sum having been paid to plaintiffs during the period from May, 1955 through June 12, 1956; and the remaining $30,000 of said sum having been paid to plaintiffs during the period from June 12, 1956 through September, 1957; and no other sums have been paid." [Clk. Tr. p. 165, lines 8-20.]

There were undisputed facts. Of particular moment was Mr. Riess' testimony that he and Mrs. Riess received the one-sixth stock interest in Simi Valley Development Company [Rep. Tr. p. 83, line 23], and that there had been no repudiation of the contract. [Rep. Tr. p. 222, lines 6-10; p. 223, lines 8-11; p. 228, lines 4-20; p. 229, lines 9-14; p. 293, lines 2-8; p. 349, lines 2-7.] (All quoted, Appellees' Br. pp. 24-26.)

The suggestion of Appellants that the legal ground for sustaining the judgment is advocated for the first time on appeal would be specious if correct, the particular and specific *ratio decidendi* being immaterial to the appeal. What matters is whether the judgment can be sustained on any basis. But it is doubly specious in that it is belied by the Findings of Fact and Conclusions of Law *proposed by Appellants themselves* for the signature of the learned Trial Judge. [Clk. Tr. pp. 320-328.] The attention of the Court is particularly invited to Conclusion of Law II, from which it is apparent that Mr. and Mrs. Riess were aware that the judgment was based, at least in part, on legal grounds, and judging by the Conclusions of Law proposed by them, in whole on such grounds:

"II.

"The contract between plaintiffs and Murchison, which is the subject matter of the within action, is of such kind and character that any breach of any of the terms thereof by Murchison or his assigns could not and did not constitute an anticipatory breach." [Clk. Tr. p. 325, lines 23-26.]

Second, and with reference to the argument at page 2 of the Reply Brief, the condition to Appellees' obligations was a condition precedent, with the burden of proof upon the Appellants (Appellees' Br., Point II A, B; Point II, *infra*).

Third, Appellants suggest (Reply Br. pp. 2-3) that Appellees view the contract as "in the nature of a lease calling for royalty payments, with payments dependent solely upon production," and point out that the leasehold analogy breaks down because of the absence of a remainder or reversionary interest. In so doing, Appellants have injected a false issue into the case, and then proceeded to demonstrate wherein it is fallacious. Strawmen aside, at no point is such an analogy drawn in our brief, nor have we at any time suggested that the contract is anything but what its unambiguous and unequivocal content makes it out to be. In the context of the clear language used by the parties, analogies have seemed to us unnecessary.

As we have heretofore pointed out (Appellees' Br. pp. 4-5), the contract called for the issuance to Appellants of one-sixth of the capital stock of Simi, and for the payment to Appellants of $98,000 as a fixed and absolute obligation. Payment of more than that sum in cash was made contingent upon water produc-

tion at 10¢ per 1,000 gallons produced, saved and sold. If production failed to generate a minimum of $24,000 a year at the specified rate, Appellants had the right, but not the obligation, to take water at the well-head in lieu of the cash they would have received had there been sufficient production. Under no circumstances were payments to Appellants to exceed $1,000,000. [Ex. 1 in evid., sec. 2(b).] Thus, the assertion that the "purchase price . . . under the agreement is One Million Dollars" (Reply Br. pp. 2-3) is the child of a misconception of the agreement. The $1,000,000 represents the ceiling, not the floor; by their contract, the parties agreed that the purchase price could never under any circumstances exceed $1,000,000, but there is nothing in the contract to justify the conclusion that willy-nilly, and without reference to production, it was to be $1,000,000, not a penny more, not a penny less.

Fourth, if we correctly understand Appellants' position as stated in their Point Fourth with respect to the dismissal of the jury, it is not that they claim to have been prejudiced by the fact that their case was not passed upon by the jury, but rather by the "reversal of position" on the part of the Trial Court which "resulted in the entry of a judgment expressly based upon Findings of Fact which invade the province of the jury." (Reply Br. pp. 3-4.) Any reversal of position here is that of Appellants, not the Trial Court. At the close of proceedings Appellants were asked by the Trial Judge to propose and prepare Findings of Fact, Conclusions of Law, and Judgment. [Rep. Tr. p. 508, lines 16-23.] They did so. [Clk. Tr. pp. 320-328.] Among the conclusions proposed by them were conclusions without either record support, or, indeed,

support in the proposed findings. For example, they proposed that the Court decree an estoppel, the effect of which would have been to excuse them from showing the happening of the condition precedent to liability and to preclude Appellees from asserting the insufficiency of the water [Clk. Tr. p. 326, lines 26-27]; they proposed that the Court decree a waiver of any claim that the Water Lands were incapable of producing sufficient quantities of water. [Clk. Tr. p. 326, line 29, to p. 327, line 1.]

The Court conducted a hearing to settle Findings and Conclusions. Those ultimately adopted by the Court ensued. Appellants who, with no record support whatever, proposed conclusions invoking the doctrines of waiver and estoppel, should not be heard to object to the making of a finding that there was no repudiation, when the record is replete with Appellants' own testimony to that effect. (Appellants' Br. pp. 24-27.)

I.

THE CONTRACT COULD NOT HAVE BEEN TOTALLY BREACHED OR ANTICIPATORILY REPUDIATED.

A. Appellants Seek Unduly to Restrict the Rule.

Appellants concede that the authorities upon which we rely represent the views of this and the Supreme Court of California. They argue that we are attempting to extend them to a factual pattern to which they do not apply. Secondarily, they suggest that this is the point at which a halt should be called to the application of the rule, thereby granting time for Professor Corbin's observations to creep into the law via the rear entrance, this and the California courts having

barred the front door in a plethora of cases heretofore cited. (Appellees' Br. pp. 11-24.) Most recently and dramatically in *Minor v. Minor,* 184 Cal. App. 2d 118, 126 (1960), the Court made it clear that Professor Corbin's views on the subject do not represent the substantive law of California [which is the law to be applied in this cause under the doctrine of *Erie R. Co. v. Tompkins,* 304 U. S. 64, 78, 82 L. Ed. 1188 (1938)] in the following language:

> "Whatever the theoretical considerations may be . . . California law, however, has marked the stopping place, and we accept it."

Moreover, the rule is neither as precise in terms or application as Appellants urge, nor is it to be limited to as narrow a field of contracts as Appellants would like, *i.e.,* insurance contracts, promissory notes, and leases. *Minor v. Minor, supra,* was a property settlement agreement calling for the payment of money in instalments, yet the doctrine was applied. It was also applied in *Farmer v. Mountain Lake Club,* 94 Cal. App. 663, 664 (1928), a contract for payment for services, and in *Flinn & Treacy v. Mowry,* 131 Cal. 481, 486 (1901), a similar contract.

One must sympathize with Appellants' manifest effort to find precision and certainty in their short and highly selective quotation from the opinion of this Court in *John Hancock Mutual Life Insurance Co. v. Cohen,* 254 F. 2d 417 (9 Cir. 1958). Their quest is as old as the law. The conceptual has charms which will forever be denied the pragmatic, which has only reason to recommend it. They have seized upon the word "unconditional" in Judge Barnes' most thorough opin-

ion in *John Hancock Mutual Life Insurance Co. v. Cohen, supra* (quoted Reply Br. pp. 5-6) as the touchstone to their concept, not recognizing that in the context used "unconditional" can have no meaning other than *"executory on one side only."* Semantics apart, however, it should be noted that the rule is stated without reference to conditions by Judge Barnes elsewhere in the same case (*supra,* 254 F. 2d at p. 426):

> "We conclude the general rule to be that the doctrine of anticipatory breach has no application to suits to enforce contracts for future payment of money only, in instalments or otherwise. . . ."

This case, we respectfully submit, is a suit to enforce a contract for the future payment of money.

1. The Condition to Liability Bars the Assertion of Any Breach, Anticipatory or Otherwise.

As we understand the argument of Appellants, it would appear that they contend that there can be anticipatory breach of an agreement where the existence of the obligation to perform is subject to a condition precedent, but that there cannot be anticipatory breach of an agreement where the obligation is in being. It is respectfully submitted that their argument defies logic. Yet it must be conceded that the word "unconditional" does appear in the cases. The vice of the argument, therefore, must lie in the meaning ascribed by Appellants to the word "unconditional," and we believe a clue to its proper meaning can be found in comment (a) to section 316 of the *Restatement of Contracts,* wherein it is stated that:

> "Where a unilateral contract or a bilateral contract that has been wholly performed on one side,

> is for the payment of money in instalments, or for the performance of other acts, not connected with one another by a *condition having reference to more than one of them or otherwise,* a breach as to any number less than the whole of such instalments or acts is partial." (Emphasis added.)

It is respectfully submitted that when the Courts speak of the agreement being "unconditional," they mean, in the language of the Restaters, that the instalments or other acts are not connected with one another by a condition having reference to more than one of them or otherwise, not unconditional in the sense of not being subject to a condition precedent, as we view the conditions, or of a condition subsequent, as it is viewed by Appellants.

To make the applicability or non-applicability of the doctrine of breach by anticipatory repudiation turn upon the presence or absence of an unrelated condition, would be a *non sequitur.* One can have nothing to do with the other except in the sense that where an obligation is subject to a condition precedent, not shown to have occurred, then there can be no breach of the obligation, anticipatory or otherwise. It is simply not capable of being breached in any manner. It is respectfully submitted that this is the type of obligation with which the parties are dealing in the present case, and this point has, we believe, been sufficiently developed in Point II of Appellees' Brief.

2. **The Agreement, While Originally Bilateral, Became Unilateral Upon the Delivery of the Deed by Appellants.**

Recognizing that the doctrine of anticipatory breach cannot be applied to a unilateral contract, Appellants have sought to warp certain portions of the agreement into executory contractual obligations on their part. The two found and referred to at pages 26-28 of Appellants' Opening Brief have, we think, been sufficiently met by the discussion at page 12 of Appellees' Brief. They now find a third "executory" obligation on their part to be performed in paragraph (h) of the agreement, which gives to Appellees the right, at their election, to reconvey the wells to Appellants, and requires Appellants to accept them in extinguishment of Appellees' obligations. Both "unperformed" obligations which Appellants seek to impose upon themselves have one common characteristic: absent some act on the part of Appellees, they do not exist. More particularly, unless Appellees request the location of wells, Mr. Riess is under no obligation to locate them. No request has been made. Unless Appellees elect to reconvey the wells, Appellants are under no obligation to accept them. No such election has been made. So far as the arbitration "covenant" is concerned, it has heretofore been pointed out that this is a matter of remedy, not of substantive right. And finally, it should be remembered that paragraph XVII of the first amended complaint contains an allegation to the effect that Plaintiffs (Appellants) have performed all of the covenants and agreements to be performed by them. [Clk. Tr. p. 29, lines 26-30.]

Federal Life Ins. Co. v. Rascoe, 12 F. 2d 693 (C. C. A. 6, 1926) is of interest, not only so far as the dissenting opinion, cited by Appellants, is concerned, but in its entire treatment of the problem. In that case plaintiff sued on a policy of disability insurance, which it was alleged the defendant company had repudiated. Under the terms of the insurance contract plaintiff was required, every thirty days, to submit a report in writing from her attending physician with respect to her disability. This she had done. She sued for anticipatory breach of the insurance contract, and the majority of the Court held that she could do so. Judge Donahue, speaking for the majority, acknowledged that there can be no anticipatory breach of a unilateral contract for the payment of money at some future date (*supra,* 12 F. 2d at p. 695), but then went on to point out that the contract there in question was not a unilateral contract. He noted that every thirty days plaintiff was required to "submit her person to the examination of a physician and pay the physician . . ." (*supra,* 12 F. 2d at 696), pointing out that this was not merely a technical requirement, but a substantial and continuing burden then in being. This, it is respectfully submitted, is quite different from the ephemeral unperformed obligations which Appellants find in the contract, which do not become obligations without some action on the part of Appellees which has never been taken. Judge Denison, dissenting, saw even the covenant to submit herself to the periodic physical

examination as a mere condition, and concluded that the contract was unilateral, so that the doctrine of breach by anticipatory repudiation would not apply. In addition, in a case involving facts much stronger, it is respectfully submitted, than the facts in the instant case, he failed to find repudiation. While he did say, "I do not understand that a contract sued upon is executory, as against a plaintiff, unless it binds him to do something, so that an action may lie against him for specific performance, or for non-performance" (*supra,* 12 F. 2d p. 693), the statement now can be seen in context. In our case, the Appellants are not bound to do anything further than what they have already done.

Appellants suggest that at pages 27-28 of Appellees' Brief we have sought to impose an obligation to demand payment in kind, *i.e.,* water, upon them, another executory and unperformed covenant. Our argument at the portion of our brief cited was that Appellants had an option, not an obligation.

We suggest that Appellants' difficulty in construing the agreements lies in their confusing the concepts of obligations under an agreement and rights under an agreement. Both parties to a unilateral agreement have rights under the agreement; only one of them, however, has obligations.

Winegar v. Gray, 204 A. C. A. 332, 337-338 (1962) does, indeed, state the familiar rule that every contract contains an implied obligation of good faith and fair dealing upon the part of each of the contracting parties. The law of contract knows no more salutary rule, but it has no application to the instant case.

3. The Agreement Is of the Type Which Cannot Be Anticipatorily Breached.

Appellants put forward the proposition that the contract is not one for the payment of money in instalments, from which they conclude that the doctrine of anticipatory breach may apply. It is certainly a contract for the payment of money, and equally certain it is not a contract for the payment of money in a lump sum, but in instalments over a period of time ratably with water produced, saved, and sold. All other covenants in the contract were either in aid of, or unrelated to, the agreement to pay money in instalments. Appellants misconceive our argument as to the obligation to pay in kind: there was never an obligation to pay in kind, but there was a right which Appellants did not exercise [and which therefore never became an obligation of Appellees] to call for payment in kind. Our argument in essence has been, and continues to be, that if water production did not create a cash obligation, then there was a right which Appellants might exercise to call for water. This was the remedy given them in the contract. They did not choose to pursue it, but rather to attempt to rewrite the contract. (Appellees' Br. pp. 27-30.) And finally, if it be assumed that the performance which, at the time of the alleged breach, had not yet become due, called for an exchange of something other than or in addition to, money, it is difficult to see why the rule should be any different. The *Restatement* makes it clear that where a bilateral contract that has been wholly performed on one side is for the payment of money in instalments, *or for the performance of other acts,* a breach as to any number less than the whole of such instalments *or acts* is partial

only (comment (a), sec. 316, *Restatement of Contracts*). In *Minor v. Minor, supra,* the Court does not confine the rule to instalment contracts for the payment of money only, but rather to the breach of unilateral contracts generally, or agreements fully performed by the complaining party which upon such performance become unilateral. There is no reason why the rule should be otherwise.

4. The Rule Applied by the Trial Court Is Neither Restricting nor Inapplicable.

In characterizing the rule applied in the cases relied upon by Appellees as "restricting," Appellants imply the premise that the common law favors the application of the doctrine of anticipatory breach. The doctrine of anticipatory breach is itself a judicial innovation in the pre-existing rules of the common law, and as such, must itself be limited.

> *Minor v. Minor, supra,* 184 Cal. App. 2d at p. 126.

In addition, in advancing the argument made in section I-A-4 (Reply Br. pp. 9-11), once more Appellants have tailored the agreement to fit their argument. There was no absolute obligation to install and construct the water system alluded to: the undertaking to do so was expressly conditioned upon the "physical ability of the well or wells now or hereafter located on the Water Lands to produce sufficient quantities of water. . . ." [Clk. Tr. p. 37.] Appellants had "expressed protection" other than that noted at page 10 of their brief. They had the right, if water production was insufficient, to take water at the well-head. [Clk. Tr. p. 36.] In addition, they had a further protection which they neglect

to mention, but which was implicit in the transaction. Appellees' stake in the Montgomery Lands and their successful exploitation was several times greater than that of Appellants. The dynamics of the contract, therefore, were such that Appellants were not confined to Appellees' implied obligation of good faith. Appellees' own self-interest could only be served by speedy and thorough exploitation of the Montgomery Lands, consistent with sound business judgment which the agreement was designed to give them the right to exercise, and which Appellants would deny them.

B. Performance of a Contract Which Cannot Be Anticipatorily Breached May Not Be Accelerated in the Absence of an Acceleration Clause.

The only point made at pages 30-31 of Appellees' Brief was that assuming Appellants overcame all of the obstacles to their contentions, they would then have a contract within and governed by the limitations prescribed in the authorities cited at page 31 of Appellees' Brief. Performance of such an agreement may not be accelerated without an acceleration clause. This is clear from *Flynn & Treacy v. Mowry,* 131 Cal. 481 (1901), where the following appears at page 486:

> "There can be no rescission or abandonment of a contract by a party who has fully performed his part of it. The obligation of the other party is measured by the terms of his agreement to the same extent as in any other contract. If this obligation is for the payment of money, and by his agreement such payment is to be made in instalments, a failure to pay the first instalment will no more give a right of action to recover them

all than in the case of an ordinary promissory note which is made payable in periodic instalments, and in which there is no provision for the maturity of the whole amount upon the failure to pay one of the instalments."

II.

ABSENT A SHOWING OF PERFORMANCE OF THE CONDITION TO LIABILITY, THERE WAS NO OBLIGATION TO CONSTRUCT OR INSTALL THE RESERVOIR AND PIPELINES.

A. The Condition Was a Condition Precedent.

That section 3 of Exhibit 1 in evidence created a condition precedent the occurrence of which Appellants were obliged to plead and prove [and which, indeed, they did plead, *e.g.,* Clk. Tr. p. 29, lines 26-30] has, we believe, been amply demonstrated at pages 42-50 of Appellees' Brief.

Appellants to the contrary notwithstanding (Reply Br. p. 15, lines 27-29), however, Appellees do not say that Appellants had a right to have the reservoir and pipelines installed and constructed by June 12, 1958, subject to termination if the water was not sufficient. On the contrary, Appellees have consistently taken the position (Appellees' Br. p. 42) that the obligation with reference to the reservoir and pipelines *never came into being* because of the insufficiency of the water. The condition cannot be read to fix the end of an obligation which under the contract never had a beginning. This is quite different from the situation in *Fort Worth Sand & Gravel Co. v. Peters,* 103 S. W. 2d 407 (Tex., Civ. App. 1937), cited by Appellants at pages 16-18 of their Reply Brief. In that case, the

lease assumed the presence of sufficient sand and gravel, and provided, "It is understood . . . that if the sand and gravel on the premises shall become exhausted . . . (lessee) shall be entitled to terminate this lease . . .". (103 S. W. 2d at pp. 408-409.) The reference was clearly to a future event, and was a condition subsequent (*Calif. Civ. Code,* §1438). This must be contrasted with the present case, however, where the contract did not prescribe on what conditions the obligation would end, but rather subject to what conditions it should come into being. Sufficiency of water was a requisite to the accrual of the right, *i.e.,* a condition precedent. (*Calif. Civ. Code,* §1436.)

While we concede the correctness of *Oosten v. Hay Haulers, etc.,* 45 Cal. 2d 784 (1955), and grant that defendant must prove all affirmative defenses, the occurrence of a condition precedent is not a matter of defense, *but a part of plaintiff's cause of action,* and must be proven by the plaintiff. (Please see cases and authorities cited, Appellees' Br. pp. 48-50.)

Appellants argue at pages 18-22 of the Reply Brief that even if the condition were a condition precedent, Appellees had the burden of proving non-occurrence because, they contend, where the circumstances are peculiarly within the knowledge of the defendant, the Court assumes occurrence and shifts the burden. If it be assumed for argument's sake that the "circumstances" were not available to Appellants (who certainly have made no effort to show that they were foreclosed from testing the well), they still must show all facts necessary to Appellees' duty of immediate per-

formance. Professor Corbin, upon whom they rely, does not support them. 3A *Corbin on Contracts,* pages 142 to 143, dealing with equitable defenses, which Appellants cite and paraphrase at page 19 of the Reply Brief, reads as follows:

> "If a fact or event is a condition precedent to a promisor's duty to render the performance promised, its absence or non-occurrence is a 'defense' in an action brought against him for breach of his promise. This is so whether the 'condition' is described as express, implied, or constructive. The use of the word 'defense' often leads to the inference that the burden of alleging and proving the facts constituting the defense rests upon the defendant; the use of the term 'condition precedent' may lead to the opposite inference. But the question whether a certain fact or event is a condition of a promisor's duty, and whether its absence or non-occurrence should be held a good defense, is not identical with the question as to which party must aver and prove its existence or non-existence.
>
> "The burden of allegation, the burden of going forward with the evidence, the burden of persuasion by proof, are not wholly determined by the mere mode of describing it. Other factors are of weight, such as the actual possession of documents, personal participation in the particular transaction, and the fact that access or information is easily available to one, and not to the other. *It is generally true, however, that the burden of alleging and proving a fact on which the plaintiff's remedial rights depends is on the plaintiff; he*

must generally show in his complaint, and prove it if disputed, that all facts necessary to the defendant's duty of immediate performance exist." (Emphasis added.)

In *Stoddard v. Illinois Improvement & Ballast Co.,* 275 Ill. 199, 113 N. E. 913 (1916), cited by Appellants at page 19 of the Reply Brief, defendant was the assignee of the lessee of a quarry under a lease for a term of years "or as long thereafter as the property is suitable for quarrying purposes." Defendant, whose assignor had worked the lease successfully for seven years, failed to quarry, and plaintiff sued for damages. Defendant claimed plaintiff had the burden of showing suitability, but the Court held that the burden of showing unsuitability was a matter of defense, the burden being defendant's. On analysis, the case is one where upon the happening of a future event (the property becoming unsuitable for quarrying), an obligation lost its binding effect, or, as defined by section 1438 of the *California Civil Code,* a condition subsequent. The burden of proof thus fell to the defendant. The case is correct, but not in point.

Fleming v. Harrison, 162 F. 2d 789 (8 Cir. 1947), cited by Appellants at page 20 of the Reply Brief, was a treble damage suit under the Emergency Price Control Act of 1942. When defendants failed to deny the applicability of the Act in the answer, plaintiff was held excused from proving it. There was also a stipulation by defendants (162 F. 2d pp. 791-792) which the Appellate Court held *prima facie* established the fact. Accordingly, a directed verdict for defendants was held erroneous.

The cases cited at page 20 of the Reply Brief, *Luttrell v. Columbia Casualty Co.,* 136 Cal. App. 513 (1934), *Kleinpeter v. Castro,* 11 Cal. App. 83 (1909), and *Joost v. Craig,* 131 Cal. 504 (1901), dealing with the quantum of proof which plaintiff must proffer to shift the burden of going forward, are not in point. *Appellants offered no proof.* All three cases, incidentally, were actions on the bonds of notaries public by persons who accepted forged deeds relying on false certificates of acknowledgment. In such cases, whether or not the name of the forger was the same as that of the true owner and known to the notary, were most peculiarly facts within the knowledge of the notary, infinitely more so than in the present case.

Bell v. Pleasant, 145 Cal. 410 (1904) stands simply for the proposition that inasmuch as it is unnecessary in a pleading to anticipate defenses, anticipatory matter will be disregarded, and the burden of proving the defense will continue to rest upon the defendant. But the occurrence of a condition precedent is not defensive. On the contrary, as has been elsewhere demonstrated in this and Appellees' Brief, pleading and proof of the occurrence of conditions precedent to liability are a part of plaintiff's case.

B. There Has Been No Waiver of the Condition Precedent.

Appellants argue that because the reservoir and pipelines were constructed and installed, notwithstanding the insufficiency of the water, Appellees have waived their right to assert the condition. The law is to the contrary.

Professor Corbin states the rule to be as follows (3A *Corbin on Contracts,* §755):

> "The performance of one party may be a condition precedent to the return duty of the other to render a series of performances in instalments. Thus, the conveyance of land by a vendor may be a condition precedent to the duty of the purchaser to make payment of any of a series of instalments of the price that fall due at or after the time set for the conveyance. If the purchaser pays one of these instalments without first receiving the conveyance, he is voluntarily doing that which he is then not bound to do; but he is not waiving or eliminating the condition of his contractual duty. The mere voluntary payment of one or more of these instalments does not make it his duty to pay subsequent instalments without getting the conveyance."

In addition, it is clear in California that where substantive rights are involved, any waiver must be supported by consideration or by acts amounting to an estoppel.

Rennie & Laughlin, Inc. v. Chrysler Corporation, 242 F. 2d 208 (9 Cir. 1957);

Pacific States Corporation v. Hall, 166 F. 2d 668 (9 Cir. 1948);

Peal v. Gulf Red Cedar Co., 15 Cal. App. 2d 196 (1936).

In *Rennie & Laughlin, Inc. v. Chrysler Corporation, supra,* the Court states the rule as follows at page 211:

> "Where substantive rights are involved, it is said frequently that waiver must be supported by either an agreed consideration or by acts amount-

ing to an estoppel. *Peal v. Gulf Red Cedar Co. of California,* 15 Cal. App. 2d 196, 59 P. 2d 183, 184; *Pacific States Corp. v. Hall,* 9 Cir., 166 F. 2d 668. It is undisputed that defendant received no consideration to waive its rights, explicit in the contract, to require that its consent to an assignment be made in writing.

"Only estoppel remains. . . ."

The *Restatement of Contracts* is in accord with the above rule. Section 279 provides as follows:

"A promisor whose duty is dependent upon performance by the other party of a condition or a return promise that is not a material part of the agreed exchange can make that duty independent of such performance, in advance of the time fixed for it by a manifestation of willingness that the duty shall be independent. . . .

"Comment C.

"If performance of the condition is a material part of the agreed exchange, an agreement to be liable in spite of nonperformance of the condition involves to so great a degree a new undertaking that the requisites for the creation of a new contract must exist."

Appellants may not at this late date, without ever having pleaded a waiver, assert a waiver of the condition precedent. Where a party intends to rely upon a waiver, it is necessary that it be pleaded.

Purefoy v. Pacific Automobile Indemnity Exchange, 5 Cal. 2d 81, 91 (1935);

Distributors Packing Co. v. Pacific Indemnity Co., 21 Cal. App. 2d 505, 509 (1937).

In both the *Purefoy* and *Distributors Packing Co.* cases, *supra,* the defendant insurance companies asserted as a defense failure on the part of the plaintiff to give timely notice. The defense was sustained in both cases, notwithstanding the contention that there had been waivers by the companies.

In the *Purefoy* case the Court laid down the following rule at page 91:

> ". . . It is the rule in this state that where the plaintiff relies on waiver of a breach of conditions in a policy, he must allege said waiver, and evidence of waiver is not admissible under allegations of performance of conditions." (Citations.)

The Court in the *Distributors Packing Co.* case summarily dismissed the plaintiff's contention of waiver with the following statement at page 509:

> "The second question is not properly presented for our consideration, for the reason that the law is settled that, where the plaintiff relies on a waiver of a breach of conditions of an insurance policy, such waiver must be alleged and evidence of the waiver is not admissible under an allegation of performance of the conditions of the contract. (*Purefoy v. Pacific Auto. Indem. Exch., supra,* 91.)"

And finally, even if the facts showed a waiver in the context of the cases cited above, Appellants could not rely upon it as a basis for affirmative suit. The doctrine of waiver can be employed as a shield, not as a sword.

In *Rennie & Laughlin, Inc. v. Chrysler Corporation, supra,* at page 210, the rule is stated as follows:

> "The amended complaint purports to ground plaintiff's action on the doctrine of waiver. It avers, 'That having consented to the aforesaid sale to said purchasers, defendant's subsequent revocation of said consent constituted a breach of said sales contracts * * *' If in fact that were the only basis upon which plaintiff could conceivably proceed further discussion would be unnecessary, for it is settled that waiver can be employed only for defensive purposes. It can preclude the assertion of legal rights but it cannot be used to impose legal duties. The shield cannot serve as a sword."

Woodard v. Glenwood Lumber Co., 171 Cal. 513 (1950), relied upon by Appellants, is not in point. In that case the covenant to erect the sawmill read as follows:

> "Said sawmill to be erected and constructed and in working order, ready to commence operations, as soon as there shall be constructed and in operation a railroad from the City of Santa Cruz, crossing Gazos Creek; . . ."

The construction and operation of the railroad fixed the *time* for performance, not the *condition* to performance. In the present case, the obligation did not exist unless there was sufficient water measured by the contractual criteria. In addition, in the *Woodard* case, the plaintiff continued to own the land; in the instant case, title to the land had passed to Appellees, and no rights of Appellants were held in suspense. Finally, the cases are entirely different in terms of the rights asserted and the remedies sought.

La Miller v. St. Claire Packing Co., 99 Cal. App. 2d 518, 521 (1950), also cited by Appellants, is not in point, it standing for the proposition that by failing timely to reject tomatoes for failure to conform to contract, but accepting and converting the tomatoes in its canning process, defendant waived strict performance of the contract. One cannot quarrel with this proposition, nor with the proposition also urged by Appellants at page 25 of the Reply Brief, that waiver may be established by verbal acts. As has been demonstrated, however, there was nothing in the acts and conduct of Appellees from which a waiver could be established.

C. The Claim of Insufficient Water Was Made in Good Faith.

A complete answer to Appellants' argument as to the lack of good faith in the assertion of insufficient water lies in the agreement itself. Appellants to the contrary notwithstanding, nothing required Appellees to satisfy themselves as to sufficiency in the interim between the first and second agreements. Nothing required that they return the wells if they were dissatisfied. This was a matter of option. While the Trial Judge made the statement attributed to him, it was premised upon an incorrect reading of the contract, and a faulty understanding of the facts. It is precisely the Trial Court's reasoning, and the conclusion reached from it, which gives rise to the cross-appeal, and it is respectfully submitted that the issue must be resolved not in terms of what the Trial Court did, but rather what it should have done.

III.

THE ORDER REFUSING TO STAY PROCEEDINGS PENDING ARBITRATION WAS IMPROPER.

A. There Is Jurisdiction to Entertain the Appeal.

Appellants contend (Reply Br. pp. 27-28) that the Court of Appeals is without jurisdiction at this time to entertain an appeal from the order denying the application for a stay of proceedings pending arbitration. They reason that since the order was an appealable interlocutory order, a failure to appeal at the time of the order constitutes a waiver of the right of appeal. This is not the law.

> *Bingham Pump Co. v. Edwards,* 118 F. 2d 338, 339 (C. C. A. 9, 1941);
>
> *Lawyers Trust Co. v. W. G. Maguire & Co., Inc.,* 2 F. R. D. 310, 312-313 (D.C. Del. (1942);
>
> *Jones Bros. Co. v. Underkoffler,* 24 Fed. Supp. 393 (D. C. Pa. 1938).

The rule appears to be well established that where an interlocutory order is made appealable under Title 28, U. S. C. section 1292, the party aggrieved has the right to appeal from the interlocutory order, but if he does not, this is no waiver of the right to complain of the order in an appeal from the final judgment.

Thus, in *Jones Bros. Co. v. Underkoffler, supra,* at pages 393-394, the following appears:

> "Section 129, supra, does not divest this court of jurisdiction to reconsider questions passed upon by an interlocutory decree before entering a final order. Section 129 grants the privilege or option

> to take an appeal from an interlocutory decree granting an injunction. Failure to exercise this option by taking a preliminary appeal, however, in no way affects the right to have the court reconsider the interlocutory order before entering a final decree, or the right to appeal from the final decree. Marden v. Campbell Printing Press, etc., 1 Cir., 67 F. 809; Ex Parte National Enameling & Stamping Co., 201 U.S. 156, 26 S.Ct. 404, 50 L.Ed. 707."

The Ninth Circuit passed upon the question in *Bingham Pump Co. v. Edwards, supra,* holding to the same effect, in the following terms (*supra,* 118 F. 2d at page 339):

> "With respect to the suggestion that the question as to the validity of the patent is not open because of a failure to appeal from the interlocutory decree as permitted by 28 U.S.C.A. § 227a, we think the same rule is applicable to that section as is applicable to § 227, and that therefore appellant was not required to appeal from the interlocutory decree. Victor Talking Mach. Co. v. George, 3 Cir., 105 F.2d 697, 699."

B. Appellees Were Not in Default in Proceeding With Arbitration.

While it is true that the original complaint was filed on October 8, 1958, the amended complaint was filed June 17, 1959 [Clk. Tr. p. 17], and on June 30, 1959 a motion to stay pending arbitration was filed. [Clk. Tr. pp. 54-55.] The arbitration issue was urged at every opportunity. [Clk. Tr. pp. 54-55, 62-63, 77-78, 84-86, 201-202, 211-212.]

We do not quarrel with Appellants' position that the stay provided in title 9, U. S. C., section 3, is not available to an applicant who is in default in proceeding with arbitration, but it is difficult to see how default in proceeding can be asserted against Appellees, who, on so many occasions, moved the Court for a stay of proceedings pending arbitration.

The case is quite different from *Radiator Specialty Co. v. Cannon Mills,* 97 F. 2d 318, 319 (C. C. A. 4 1938), cited by Appellants at page 33 of the Reply Brief, where the motion for a stay was not made *until the day set for trial.* In *American Locomotive Co. v. Gyro Process Co.,* 185 F. 2d 316 (6 Cir. 1950) and *American Locomotive Co. v. Chemical Research Corp.,* 171 F. 2d 115 (6 Cir. 1949), the Court emphasized that a seven-year delay in proceeding to arbitration was "unreasonable and unexcusable under all the circumstances, and constituted 'default' on its part in proceeding with arbitration." (171 F. 2d p. 21.) Both *American Locomotive Co.* cases are infinitely removed from the facts of the instant case.

Closer to the point, it is respectfully submitted, is *Kulukundis Shipping Co. v. Amtorg Trading Corp.,* 126 F. 2d 978, 989 (2 Cir. 1942), where the Court stated as follows:

> "We take that proviso to refer to a party who, when requested, has refused to go to arbitration or who has refused to proceed with the hearing before the arbitrators once it has commenced. The

appellant was never asked by appellee to proceed with the arbitration; indeed, it is the appellee who has objected to it. In *Shanferoke Coal & Supply Corp. v. Westchester S. Corp.,* 2 Cir. 1934, 70 F. 2d 297, plaintiff alleged that defendant, after part performance, materially breached the contract. The defendant in its answer denied the allegations and, as a special defense, set up an arbitration clause in the contract, alleged that it was willing to arbitrate, and moved for a stay under Section 3 of the Arbitration Act. Answering plaintiff's contention that defendant was 'in default in proceeding with such arbitration,' we held that the fact that defendant may have breached the contract was not a 'default' within that statutory provision; we said that the initiative as to proceeding with the arbitration rested upon plaintiff, adding: 'If it did not but sued instead, it was itself the party who fell "in default in proceeding with such arbitration," not the defendant.' Our decision was affirmed in *Shanferoke Co. v. Westchester Co.,* 1935, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583."

Also of significance is *Almacenes Fernande, S.A. v. Golodetz, et al.,* 148 F. 2d 625, 628 (2 Cir. 1945). where the following appears:

> "However, delay in moving for an arbitration order will not alone amount to a default within the proviso."

To the same effect is *Robert Lawrence Company v. Devonshire Fabrics, Inc.,* 271 F. 2d 402, 412-413 (2 Cir. 1959).

C. The Stay Should Have Been Granted.

1. The Agreement Evidences a Transaction Involving Commerce.

It is submitted that Appellants have failed to meet the cases and authorities cited at pages 50-55 of Appellees' Brief. These are believed to be controlling. However, meeting Appellants on their own ground, it is to be noted that the applicability of Title 9, U. S. C., is not restricted to contracts *in* commerce, but rather to contracts evidencing transactions *involving* commerce. By definition, the concept of involvement is broad. As was said in *Culver v. Kurn,* 354 Mo. 1158, 1163, 193 S. W. 2d 602, 604 (1946): "'Involve' imports the idea of 'implicate,' 'include,' 'affect.'" Recent cases dealing with the clause "involving commerce," as used in Title 9, U. S. C. §2, indicate the trend toward a broad view of commerce. Please compare:

In re Cold Metal Process Co., 9 Fed. Supp. 992 (W. D. Pa. 1935); with

Petition of Prouvost Lefebvre, etc., 105 Fed. Supp. 757 (S. D. N. Y. 1952); and

Wilson & Co. v. Fremont Cake & Meal Co., 77 Fed. Supp. 364, 373 (D. Neb. 1948).

In *Petition of Prouvost Lefebvre, etc., supra,* the respondent contended that the contract there concerned did not evidence a transaction involving commerce, because the shipments to be the subject of the arbitration were wholly intrastate. The Court held that because the contract evidenced a transaction between persons in different states (the identical situation before the Court in the instant case), and because instructions for the

wholly intrastate transaction were through the mails, the transaction involved commerce. The arbitration was ordered.

2. **There Is an Arbitrable Issue Before the Court.**

Appellants' argument to the general effect that there is no arbitrable issue (Reply Br. pp. 30-31) is premised necessarily upon their assumption that the condition precedent has been waived. Manifestly, if there was no waiver of the condition precedent, the issue of sufficiency remained in the case and under the terms of the agreement was arbitrable. The Court's attention is invited to section II B of this brief which, we believe, demonstrates that the condition precedent has not been waived.

It is respectfully submitted that the arbitrable issue exists by reason of the following:

(a) The contract contemplates that an arbitrable controversy as to water may arise [Clk. Tr. pp. 46-47];

(b) The amended complaint tenders the issue as to whether the wells are physically able to produce sufficient water [Clk. Tr. pp. 28-29];

(c) The answers filed on behalf of the Appellees accept the tender and create the issue as to the sufficiency of water [Clk. Tr. pp. 72, 154].

Under the circumstances, and in the absence of a waiver (which Appellants did not believe existed at the time of the filing of the first amended complaint), it is difficult to see how they can contend that the matter of the sufficiency of the water was not an issue in the case.

3. Arbitration Should Have Been Ordered by the District Court.

Appellants concede that the contract was to be performed "for the most part" in California, but was "at least partially executed and performed in Texas." (Reply Br. p. 34.) We think it clear that a contract to be performed partially in one state and partially in another, contemplating the building of many structures, and necessarily the interstate shipment of materials in connection therewith, involves commerce in the sense of Title 9, U. S. C.

In this connection, the Court's attention is invited to the case of *Ross v. Twentieth Century-Fox Film Corporation,* 236 F. 2d 632 (9 Cir. 1956), where the contract concerned was solely and exclusively for the sale of motion picture rights to a literary property entitled "The Robe." The purchase price was to be determined by the net receipts of the motion picture based on the work. The contract was made in California, and the transfer of the literary rights provided therein was effected in California. The Ninth Circuit held that since the contract called for the production of a motion picture for national sale and distribution, and because that provision was no minor nor incidental aspect of the bargain, the contract was one evidencing a transaction in commerce, and that the stay provided in Title 9, U. S. C. §3 should be granted.

The instant case is stronger on its facts than *Ross v. Twentieth Century-Fox Film Corporation, supra.*

We believe Appellants misunderstand the holding of *Bernhardt v. Polygraphic Co. of America,* 350 U. S. 198, 76 S. Ct. 273 (1956) when they state that the

case stands for the proposition that the right to arbitrate does not owe its existence to Federal law. The holding of the *Bernhardt* case is that absent a contract within the ambit of Title 9, U. S. C. §2, the substantive right to arbitration is to be determined by state law. But it is quite clear from *Robert Lawrence Company v. Devonshire Fabrics, Inc.,* 271 F. 2d 402, 407-410 (2 Cir. 1959) that by its enactment of the United States Arbitration Act the creation of a body of Federal substantive law was intended by Congress. In that connection, Judge Medina stated, *supra,* at page 406, the following:

> "We think it reasonably clear that the Congress intended by the Arbitration Act to create a new body of Federal substantive law affecting the validity and interpretation of arbitration agreements . . ."

Accordingly, Appellants' assertion that the Federal Court "only enforces the state created right by rules of procedure, required by the Federal Act, not necessarily the same as state procedure," is wholly without support.

In addition, as noted in Appellees' Brief at page 53, the question of whether or not an agreement contains a valid arbitration clause is a question of procedure, determinable by Federal and not local law, and therefore, as pointed out, the conflicts problem which Appellants raise at page 34 of the Reply Brief does not really exist.

At page 38 of the Reply Brief, Appellants suggest that *Robert Lawrence Company v. Devonshire Fabrics, Inc., supra,* is some kind of unique judicial aberration.

That it is not, we believe, is quite clear from *Metro. Industrial Painting Corp. v. Terminal Construction Co.,* 181 Fed. Supp. 130, 133 (D. C. S. D. N. Y. 1950), and *Rosenthal-Block China Corporation,* 183 Fed. Supp. 659, 661 (D. C. S. D. N. Y. 1960), where the Court quotes with approval the language of Judge Medina hereinabove set forth.

Appellants then go on to argue, if we understand them correctly, that if we assume that the contract here in question does not evidence a transaction involving interstate commerce, that the law of Texas with respect to arbitration applies. In *2 Beale, Conflict of Laws,* page 1245, the following appears:

> "American courts, without exception, hold that arbitration agreements pertain to remedy or procedure. Consequently, *the law of the forum determines their enforceability, regardless of the place where the contract containing an arbitration provision was made, or was to be performed, or the law intended by the parties to govern* . . . Following the remedy rule the Federal Courts apply their own, and not the state court-common-law or statute with regard to arbitration. The English cases uniformly hold arbitration substantive, with results contrary to those set forth above." (emphasis added.)

Professor Beale cites a wealth of cases for the proposition that arbitration is procedural and goes to remedy, rather than substantive right, and in the context of the *Erie Railroad* doctrine we respectfully submit that in this area, and assuming that Title 9, U. S. C. is for some reason inapplicable, the Court would look

to the California law with respect to the arbitration clause, and not to the Texas law.

In *Crofoot v. Blair Holdings Corp.,* 119 Cal. App. 2d 156, 193 (S. Ct. hearing denied 1953), the District Court of Appeal of the State of California stated the proposition that "it is, of course, the law that in the absence of agreement to the contrary the law of the forum governs arbitration proceedings . . .".

Appellants to the contrary notwithstanding, we believe it clear that sections 1280 and 1284 of the Code of Civil Procedure of the State of California means what they say in declaring arbitration agreements to be valid. Granted that it is not an absolute right, and that the statement in *Local 659, I. A. T. S. E. v. Color Corp. of America,* 47 Cal. 2d 189, 194 (1956) is correct, Appellants have not revoked the contract, and indeed are proceeding in reliance upon the contract.

Conclusion.

It is respectfully submitted that Appellants have had their day in court. If they are dissatisfied with what they were awarded, the error was not that of the Trial Court, but rather their own in asking for more than they were entitled to.

Insofar as possible, we have attempted to confine this brief to the Cross-Appeal. As we noted in Appellees' Brief, the Cross-Appeal was taken and the points raised in order to bring the three errors to the attention of the Court of Appeals so that they should not become the law of the case in the event of reversal by reason of Appellants' appeal. We repeat our willingness, however, to accept a dismissal of the Cross-Appeal notwithstand-

ing the three errors noted therein, should the Court of Appeals conclude that Appellants' appeal is not well taken.

Accordingly, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

STUART L. KADISON